

A Patchwork Strategy of Consensus Establishing Rule of Law in Afghanistan

By MARK R. HAGEROTT, THOMAS J. UMBERG, and JOSEPH A. JACKSON

The gavel strike of justice in Kabul does not echo far in the Hindu Kush mountains. The need for rule of law and legal reform in Afghanistan could not be more urgent given the recent successful offensives in the southern provinces. Despite 9 years of efforts by a number of organizations and governments, however, the equitable dispensation of justice in the South and throughout Afghanistan remains an unattained aspiration. Not surprisingly, many Afghans believe that because of corruption, the national government is incapable of resolving disputes arising from the population. Most alarming is that while 67 percent of Kandaharians—a crucial population as capacity develops—believe that the government cannot provide justice because of corruption, 53 percent believe that the Taliban are incorruptible.¹

Combined forces have successfully staged military operations but have not made much progress in establishing the rule of law because unifying leadership and comprehensive rule of law strategic plans are lacking. As a result, the rule of law remains elusive. Moreover, time is running short to effectively establish the principal elements of a system of justice—in particular, a criminal justice system with an integrated network of police, courts, and correctional institutions connected to traditional forms of justice. Without focused leadership and an overall strategic plan, sustained with increased numbers of advisors, the extension and credibility of a

functional justice system both in and beyond Kabul will remain ephemeral. As a consequence, the Afghan people will continue to look elsewhere to obtain justice—even the ruthless but efficient justice administered by the Taliban.



Afghanistan chief of justice speaks to mullahs and religious leaders during training on legal rules and constitutional rights

Raising the Bar

On the surface, the history of Afghanistan is a narrative of invasion and internal strife among kings and warlords. The list of would-be rulers both internal and external is well known. Yet one aspect often overlooked—in the past as now—is that regardless of the application of arms, ruling Afghanistan and its mosaic of ethnicities hidden within a rugged landscape requires a firm establishment of the rule of law—that is, access to a dispute resolution process and a system of criminal justice that impartially determines guilt and imposes sentences. Without the establishment of the rule of law, force of arms

can provide only temporary stability and the illusion of governmental legitimacy.

Despite the noticeable lack of leadership and a strategic plan in the larger sphere of legal reform, not all legal efforts are falling short in Afghanistan. Courts at various levels do function, if imperfectly, and a measure of formal justice is accessible to some of the population. One of the more promising areas of legal reform resides within the Afghan National Army (ANA). The military judicial system includes functioning courts, judges, prosecutors, defense counsel, and appellate review. Furthermore, there exists the capacity for pretrial detention and long-term post-trial confinement. As a measure of the maturing military justice system, in the last 3 years, the ANA has adjudicated approximately 400 cases per year.²

The ANA military justice system has many of the advantages that the civilian justice system lacks—chiefly, the leadership and strategic planning support provided by the Combined Security Transition Command–Afghanistan (CSTC–A). In addition to the ANA prosecutors, defense attorneys, and judges who exist in every ANA corps headquarters compound, courthouses built on secure ANA installations provide justice officials with a level of protection from attack that is lacking in most civilian courts. This security allows prosecutors and military judges to function with less concern for acts of retribution. Most important, the military legal system benefits from focused, well-resourced international advisors under an organized and unified command and control scheme. A direct result of this focused leadership is the ability to capitalize on indigenous training capacity: Afghans training Afghans.³

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U.S. Air Force (Sarah R. Webb)

State Department law expert, Ghazni Provincial Reconstruction Team executive officer, and Qara Bagh district official meet with area elders

The ANA military justice system is operated and led by Afghans but places a strong emphasis on partnering with CSTC-A advisors. Presently, three full-time CSTC-A advisors are dedicated to the General Staff Legal Department in Kabul. Outside of Kabul, the North Atlantic Treaty Organization (NATO) Intermediate Joint Command, in cooperation with CSTC-A, provides U.S. and coalition military judge advocates to advise the ANA prosecutors, defense attorneys, and judges at each of the corps headquarters.⁴ Focused, well-resourced partnering and training are evident in the ministries of defense and the interior.⁵

Each day, CSTC-A sends hundreds of military and contract advisors to mentor their Afghan police and military counterparts in these security ministries. These advisors help their counterparts develop the support systems and institutions necessary for these ministries to function independently and well into the future. However, improvements in the police and army, without significant progress in the other sectors and ministries relevant to the overall rule of law, will not achieve the goal of ensuring that the government has the

legitimacy and stability to survive without substantial foreign support. To achieve the overall rule of law goal, a nationwide rule of law strategy, under a unified command structure and with more resources, is needed in order for the attorney general's office, ministry of justice, and supreme court to mature at the pace needed to win public trust and confidence.

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Analyzing the strides made in the past 3 years of manning, training, and equipping the remodeled ANA and to a lesser degree the police forces, it is clear that they benefited from one plan and the identification of a responsible lead agency—CSTC-A. That single, accountable lead agency guided development of the legal system within the narrow venue of the ANA. Likewise, aggres-

sive, accountable leadership with a plan and resources can create change from Kabul to Kandahar.

In stark contrast to the CSTC-A effort, development of the civilian court system lacks a primary leader and a systematically applied strategy to develop a coherent structure to reach the vast majority of Afghans.⁶ In Afghanistan today, coordination meetings, with few accountability mechanisms, have been substituted for leadership. Moreover, whatever plans do exist do not establish or claim control over the entire problem in either geographic or conceptual terms.⁷ Rule of law development and execution are the responsibility of the Department of State.⁸ However, in Afghanistan, U.S. Government rule of law initiatives are carried out by a host of agencies with staffs in Kabul, but outside the purview of the Ambassador. While the U.S. Ambassador to Afghanistan may have ostensible authority for U.S. rule of law activities, Federal agencies often remain loyal to their respective funding sources, in part because agendas and funding are controlled largely from Washington rather than Kabul. To be most effective, agency personnel and budgets for Afghani-

stan might be placed under the direct control of a single diplomat, perhaps an Ambassador whose sole focus is the rule of law arena.⁹

Bureaucratic pitfalls further plague rule of law efforts. Agencies, governments, and nongovernmental organizations have yet to create a mechanism to coordinate their activities or to expedite the establishment of contracts to create the supporting programs to facilitate needed reforms. The reformers have failed to adequately harness the efforts of the World Bank and the Independent Directorate of Local Governance designed to link the central Afghan government to the regional and provincial levels. In this vacuum, the military commanders in some regional commands have had no choice but to take the initiative and build physical infrastructure for courts and, where necessary, partner with police units. Thus, while all well intentioned, they create the illusion of progress, but do not create a lasting, well-structured architecture for the justice system.

The lack of problem ownership and planning contributes directly to the endemic problems in the Afghan courts. They suffer from the absence of competent and honest prosecutors to lead investigations, and a police force of multiple capabilities that is structured to support national defense efforts more than civil policing duties. The court system remains Kabul-centric, and it is difficult to move attorneys to the rural areas to establish a physical representation of law and order. Low pay for judges and prosecutors institutionalizes corruption. A court prosecutor earns approximately \$70 per month. Not surprisingly, some officials take bribes to earn

a subsistence living that the present Afghan administration cannot provide. In contrast, an Afghan National Police patrolman can (based on location and duty) earn up to \$200 per month. With this disparity, the level of risk the patrolman faces and the quality of legal advice and service rendered by the courts vary widely.

Bridge to the Future

Afghanistan is at risk. The time for vigorous leadership in the civilian justice sector is long overdue. The development of the police continues in parallel with the detention and corrections systems. Meanwhile, the connecting institution between the police and the prisons—the courts—languishes in a precarious gray zone. If no single leading entity steps up to oversee all the facets of the rule of law, a compromise or bridging effort will most likely be needed. Two options could provide a link to the future.

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One option would be to utilize the overall command structure provided by the International Stabilization Assistance Force (ISAF), which contains the links to the command elements and civil institutions of the larger international community that participates in the coalition. In practical

terms, ISAF has nationwide reach through its subordinate command and control structures: the NATO Training Mission–Afghanistan and Intermediate Joint Command. These could serve as viable conduits to extend the central Afghan government's ability to establish the law in remote and contested areas. Of equal importance, ISAF has access to the resources: financial and human capital. The current flagging efforts of the United Nations could be reinvigorated by the security provided by NATO forces. The intertwining of leadership, security, and an international effort of court establishment would do much to stabilize the country and provide needed credibility to the government. It would also ensure that all stakeholders in Afghanistan's development are accountable and that it is not an exclusively American enterprise.

A second opportunity expands existing structures. The newly established Task Force 435 provides corrections oversight, in partnership with the Afghan National Security Forces, of the national security detention facilities for Afghanistan. This organization could provide a more tailored and systematic approach. Task Force 435 will eventually expand to become a combined joint inter-agency task force (CJIATF), and it could (if properly developed) provide the command and control that is lacking with regard to the court system. For U.S. efforts, a CJIATF would include senior civilian and military leadership accountable directly to the U.S. Ambassador as well as to the presidents of Afghanistan and the United States for progress in developing rule of law institutions.



Judge convenes conference for lawmakers, police, nongovernmental organizations, and other agencies to discuss future of law in Afghanistan



Judges, police, and corrections department members discuss problems and solutions during rule of law conference in Jalalabad



VADM Robert Harward assumes command of Joint Task Force 435, which will oversee detainee review processes and coordinate with other agencies to promote rule of law in Afghanistan

The recent State Department decision to establish a rule of law CJLITF is long overdue but at least is a step in the right direction. The question of how well funded and manned the task force will be remains unclear. Indeed, it should be spared no expense and monitored closely. One possible vision of the development would include working from the corrections systems, linked to the courts and then to the police forces, and the respective ministries (Justice, Interior, and so forth) would establish the needed conduits for connecting the respective elements.

There is not a lack of effort or good intentions supporting rule of law development in Afghanistan. There is, however, a lack of strategy, resources, and, most important, accountable leadership. Without accountability, rule of law development efforts will continue to be executed slowly through a host of meetings and draft strategies that accomplish little in terms of real coordination or progress. For the United States, a unified, combined

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joint interagency task force would address this shortfall by providing one commander—civilian or military—accountable to national leadership for success in this critical area. For international efforts, the United Nations Assistance Mission in Afghanistan must assert more authority on donors to coordinate their efforts. The United Nations and government of Afghanistan must similarly be more assertive in demanding that international organizations unify their efforts in alignment with the priorities set forth in the Afghan National Development Strategy. Without concerted efforts effectively orchestrated, the tragic saga of Afghanistan's violent history will continue. **JFQ**

NOTES

¹ *Human Terrain System: Kandahar Province Survey Report* (Burlington, MA: Glevum Associates, March 2010).

Since 2001, no fewer than four conferences have been held and at least one strategy has been created and published affirming the need for and the importance of the rule of law in Afghanistan. The United States has created a strategic plan for developing this rule of law. This strategy, however, does not have authority to force other organizations, groups, or nations to conform to one single effort. The United Nations (UN) initiatives include the mandate of the UN Assistance Mission in Afghanistan (UNAMA), which was renewed by UN Security Council Resolution 1917 (March 22, 2010). The annual resolution by the Security Council forms the mandate for UNAMA and defines priorities. Additionally, Resolution 1917 (2010), which was unanimously adopted by the 15-member Security Council, mandated UNAMA to continue to lead international civilian efforts in areas such as rule of law, transitional justice, and combating corruption; to promote the country's development and governance priorities through the Joint Coordination and Monitoring Board; and to strengthen cooperation with International Security Assistance Force and NATO Senior Civilian Representatives to improve civil-military coordination. See UNAMA Web site, available at <<http://unama.unmissions.org/Default.aspx?tabid=1742>>. Resolution 1917 (2010) calls upon all international parties to coordinate with UNAMA in the implementation of its mandate (Resolution at 5). UNAMA, through the Joint Coordination Monitoring Board, has served as largely a coordinator, rather than a commander or firm director, of rule of law development.

² See Afghan National Army (ANA) judicial records, 2006–2009. In addition to the Afghan army courts, others aligned with the security sector are more or less functioning under a heavy cloak of mentorship. They include courts such as the

Counter Narcotics Court and the Anti-Corruption Tribunal.

³ The ANA have been full partners with the NATO Training Mission–Afghanistan/Combined Security Transition Command–Afghanistan (NTM–A/CSTC–A) in conducting a Basic Legal Officer Course, paralegal course, and criminal investigative training. A schoolhouse for legal instruction recently opened, with space planned for a law faculty in the new national defense university in 2012.

⁴ The NATO Intermediate Joint Command (IJC) is responsible for partnering with ANA units at the level of corps and below. However, the IJC currently lacks the judge advocates needed to partner/advise at this level. Consequently, NTM–A/CSTC–A has retained this mission until the IJC is properly resourced. CSTC–A attorneys have recently established training for ANA investigators, including contracting with experienced U.S. investigators to travel throughout Afghanistan as trainers and advisors of ANA criminal investigators. The ANA court system holds promise, but it too struggles to deal with crimes committed by senior officers (colonels and generals) who believe they are above the reach of the legal system. Changing the culture of entitlement, spoils, and cronyism will take time.

⁵ The Ministry of the Interior is charged with development and oversight of the National Police. This structure contains the locally fielded Afghan Uniform Police, Border Police, and Afghan Civil Order Police. In terms of defending and stabilizing Afghanistan, the police are intended to provide the stabilizing authority after targeted areas have been cleared by the army. However, in reality, the police often must fight in the role of light infantry to defend themselves in the isolated outposts scattered across Afghanistan. These postings make ideal targets for the Taliban.

⁶ Afghan law has both a formal and a traditional justice system that operate together. This article suggests ways to improve development of the formal justice system but recognizes that the traditional system is a legitimate part of Afghan justice that is relied upon by the population.

⁷ There is no overall coordinator, but rather a network approach by the international community. This approach is not unusual for developing countries. Given the rapid evolution of the Ministry of the Interior and the police forces, the developing country model is not sufficient to meet the legal reform needs of Afghanistan.

⁸ *U.S. Government Rule of Law Strategy for Afghanistan* (Washington, DC: Department of State, 2010).

⁹ As of April 12, 2010, U.S. Ambassador and U.S. Senior Representative to Afghanistan Richard C. Holbrooke announced that Ambassador Hans Klemm (former Ambassador to Timor/Leste) would oversee the development of the rule of law.